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Review of the *Privacy Guidelines for Broadcasters*

Submission to the Australian Media and Communications Authority (ACMA)

October 2011

CONTENTS

We note that we have no objection to the publication of this submission in full.

To further the public interest in transparency of public policy processes, APF strongly supports the position that all submissions to public Inquiries and reviews should be publicly available, except to the extent that a submitter has reasonable grounds for confidentiality for all, or preferably part of, a submission.

The Australian Privacy Foundation

The Australian Privacy Foundation is the main non-governmental organisation dedicated to protecting the privacy rights of Australians. The Foundation aims to focus public attention on emerging issues which pose a threat to the freedom and privacy of Australians. Since 1987, the Foundation has led the defence of the right of individuals to control their personal information and to be free of excessive intrusions. The Foundation uses the Australian Privacy Charter as a benchmark against which laws, regulations and privacy invasive initiatives can be assessed. Further information about the Foundation and the Charter are on our website[1].

Introduction, and relationship to other initiatives

The APF welcomes the opportunity presented by ACMA's review of its privacy guidelines for broadcasters.

We have been calling for several years for a new approach to privacy and the media, best summed up in our 2009 policy statement which can be found on our website.[2]

This submission draws on this policy statement; on more recent submissions we have made, including two to the 2010 Senate Committee Inquiry into Online Privacy[3], and on a recent APF Policy Statement re a Privacy Right of Action[4] - which we emphasise is relevant to, but not primarily directed at, media intrusions.

We have also published a history of our campaign on the media and privacy[5]

We note that when drawing up our 2009 Policy Statement, we wrote to the Chairman of ACMA[6]. Disappointingly, we never received a substantive reply to our suggestions – just an offer to include us in future consultations.

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[1] http:// www.privacy.org.au
[2] http://www.privacy.org.au/Papers/Media-0903.html
[3] At http://www.privacy.org.au/Papers/Sen-OLP-100813.pdf and http://www.privacy.org.au/Papers/Sen-OLP-Sub2-101130.pdf
[4] At http://www.privacy.org.au/Papers/PRoA.html
[5] At http://www.privacy.org.au/Campaigns/Media/
[6] At http://www.privacy.org.au/Papers/ACMA-090520.pdf

We had further correspondence with ACMA in 2010 concerning the research that was then being commissioned (and which we note has informed the current consultation paper – see below).

We note that there are at least three other initiatives that overlap with this one – the Department of Communications, Broadband and the Digital Economy review of the policy and regulatory frameworks that apply to the converged media and communications landscape ('*The Convergence Review*'[7] ; the federal government's recently announced *Independent review of the print media*[8] (the terms of reference of which cover "[t]he effectiveness of the current media codes of practice " and the Australian Press Council's current consultation for its '*Standards Project*'[9].

We note that the Australian Law Reform Commission's 2008 report on privacy *For Your Information*[10] devoted an entire Chapter (Ch.42) to a discussion of the 'journalism' exemption from the NPPs (Privacy act 1988 s7B(4)). We mention some of the ALRC's specific conclusions below, but here make the general point that the broadcasting Codes of Practice are of particular significance because the journalism exemption only applies if the media organization in question is publicly committed to observe published standards dealing with privacy.

While there is no mechanism for approving such standards, it seems to have been accepted by ACMA and the Privacy Commissioner (now part of the Office of the Australian Information Commissioner) that the Broadcasting Codes meet the criteria and therefore currently form a basis for broadcasters not to have to comply with the NPPs.

It would be helpful if both ACMA and the Information Commissioner stated explicitly that they treat the Broadcasting Codes of Practice as satisfying the requirements of s.7B(4).

1. On the assumption that the Codes are a basis for the journalism exemption from the provisions of the Privacy Act, APF submits that it is essential that the Codes are comprehensive, appropriately protective of all aspects of privacy, enforceable, and enforced.

The Government is responding to the ALRC Privacy Report in stages, with its response on the Exemptions and related Telecommunications recommendations deferred to an unspecified future round of amendments. While we are disappointed that the government is not moving more quickly to address the ALRC recommendations, they remain highly relevant as the outcome of the most recent comprehensive study of privacy in Australia. We submit that ACMA should take into account, ***better than it seems to have done***, the relevant findings of the ALRC (and those of the other State Law Reform Commissions that have recently reported on privacy).

2. The Consultation Paper does not adequately reflect the relevant findings of the ALRC (and those of the State Law Reform Commissions that have also recently reported on privacy). APF submits

[7] At http://www.dbcde.gov.au/digital_economy/convergence_review
[8] At http://www.minister.dbcde.gov.au/media/media_releases/2011/254
[9] At http://www.presscouncil.org.au/standards/
[10] At http://www.alrc.gov.au/publications/report-108

that it is essential that ACMA consider them, address them, and reflect them in the Guidelines, and require them to be reflected in all relevant Codes.

It would be completely unsatisfactory if these various reviews did not at least try to reach a common view on the privacy standards that should apply to similar activities across the full spectrum of media and communications.

Comments on the Consultation Paper (CP)

Inputs to the review

Complaints experience

We note that ACMA has conducted 43 broadcasting investigations concerning privacy since August 2005 (CP page 2). Many people would be deterred from lodging complaints both by the difficulty of navigating the complaint processes, and by a widespread view in the community that the media are 'a law unto themselves' and unwilling to countenance criticism (as evidenced by the typically aggressive response to criticism, and by minimal 'in bad grace' publication or broadcast of adverse code of conduct findings).

3. APF cautions against any conclusion that the small number of privacy complaints to ACMA about broadcasters means there is little public concern.

We note from the ACMA Annual Report 2009-10 that both of the new codes of practice registered in 2010 – for commercial TV and commercial radio - require broadcasters to accept complaints electronically. It would be valuable to know how many enquiries and complaints about privacy the broadcasters themselves received – while this information may be available in media organisations' annual reports, it would be helpful if ACMA collated statistics for the broadcasting industry as a whole, with an attempt at standardization to aid comparison. There is another major difficulty in relying on complaint statistics and that is the definition of a privacy complaint. Broadcasters may well receive complaints about the collection and handling of personal information which would be potential breaches of the Privacy Act NPPs which are not recognized as such, either by the complainant or the respondent, and some of these will in any case be covered by the 'journalism' exemption from the NPPs (Privacy act 1988 s7B(4)).

Many complaints about the *content of broadcast material* may involve a privacy element but may also, and often primarily, be characterized (by the complainant, the respondent or both) as about something else – e.g. vulnerability, bad taste, decency, offensive, humiliating, etc.). Similarly complaints about *journalistic or editorial methods* may go to issues of 'intrusion' without being acknowledged as privacy complaints. We note that the major case of the Today FM 'Kyle & Jackie O' programme lie detector interview, reported in the 2009-10 Annual Report as having attracted 170 separate complaints, appears not to have been characterized by ACMA as 'privacy' despite the attempted revelation of the teenager's sexual history clearly being a privacy issue as most people would see it. We also note that the recent phone hacking scandal in the UK happens to have been framed as a privacy issue, but separately from

the 'data protection' issues concerning sources identified in a 2006 UK Information Commissioner report, and it could well have been framed differently – as primarily a breach of the criminal law relating to telecommunications interception, without much reference to privacy.

Without some agreed criteria, supervised reporting and centralised collation of figures, it is very difficult to tell from complaints statistics the true level of complaint about 'breach of privacy'. We contrast the absence of a good 'evidence base' in the broadcast domain with the extensive complaint and enquiry statistics available to inform the policy debate in the ACMA's other areas of regulation such as telecommunications generally, the Do-Not-Call Register and Spam.

It might be expected that the Privacy Commissioner's enquiry and complaints experience would also throw some light on media breaches of privacy, but regrettably not. The Privacy Commissioner's complaints reporting does not identify media as a separate category, and there is no category that includes media in the 'top ten' sectors table in the 2009-10 Annual Report (Chart 3.4) – there were however 216 enquiries categorized as 'theatres, sport and media', which may include some enquiries about the media and privacy (Chart 3.1).

4. APF submits that ACMA should collate statistics for the broadcasting industry as a whole, in a manner that encompasses all privacy-related complaints, and aids comparisons.

While mentioning Spam and the Do Not Call Register regimes, which are a highly specific form of privacy protection, we take the opportunity to commend ACMA for its active monitoring and enforcement in these areas, leading to some high profile enforcement action. This sends a strong message to businesses about acceptable behavior, and we suggest that ACMA's activities under the Spam and Do-Not Call Register legislation offers useful experience which could be drawn on when considering media regulation reform.

Criticism of complaints handling under Codes

ACMA is aware of the detailed analysis of telecommunications privacy complaint handling published recently by ACCAN.[11] We submit that this criticism is also relevant to consideration of media privacy complaints. See also our more general comments below about the limitations of Codes as regulatory instruments.

Survey Research

The two research reports published by ACMA in August 2011 are a useful contribution to the discussion, and illustrate the complexity of public attitudes to privacy. The qualitative report derives from its interviews an interesting typology of attitudes. The quantitative report is limited, and disappointingly makes no attempt to estimate what proportion of the population fall into the four types identified by the qualitative research. It does however clearly identify high levels of concern about privacy intrusion as perceived in a range of scenarios put to respondents that reflect common broadcast media practice.

[11] Connolly, C and Vaile, D. *Communications privacy complaints: in search of the right path*, Cyberspace Law and Policy Centre with support of ACCAN (http://accan.org.au/) launched 14 Sept 2010, http://cyberlawcentre.org/privacy/ACCAN_Complaints_Report/report.pdf

We note that there are a number of reports of survey research published by the Privacy Commissioner.

5. APF submits that ACMA should review the survey research previously conducted by the Privacy Commissioner, place it in the context of ACMA's own research published in August 2011, and publish the results as further input to the review.

Case law vs Law Reform Commission Reports

The Guidelines rely heavily on footnoted case law, but these cases are typically of courts trying to apply common law concepts to the unfamiliar area of privacy.

In 2001 the High Court, in *ABC v Lenah Meats* indicated the way is open for the creation of a common law right of action for breach of privacy, regardless of statutory moves; but the ambiguity and uncertainty that this leaves us with for a decade -- will they or won't they, who will be the first to succeed in getting this emerging right of action up, how will a court adapt old, partly irrelevant pre-digital case examples to the global networked age? -- is an unsuitable basis for settling the principles on which the media should operate.

It would be a reasonable presumption that at some stage in the not too distant future there will be one or both of a common law and a statutory right of action for privacy; the current inconclusive situation makes it difficult to draw clear guidance from past case law, other than to suggest that past lack of exercised rights of action is not a reliable guide for the future. APF supports a more a more policy- and law-reform based approach starting from the ALRC's analysis (see above).

6. APF submits that the Consultation Paper places too much reliance on court judgments of limited relevance, and places too little weight on the more considered views of Law Reform Commissions which have approached the subject of privacy in more comprehensive inquiries.

Current Regulation

The Consultation Paper explains that there are currently 7 separate codes of practice for broadcasters containing privacy provisions – these cover, respectively:

- The ABC
- SBS
- Commercial TV
- Subscription Broadcast TV (this Code does not apply to subscription TV delivered by cable?)
- Community TV
- Commercial Radio
- Community Radio

The supervisory, complaints and enforcement roles of ACMA under the Broadcasting Services Act 1992 (BSA) and the ABC and SBS legislation appear to be effectively common to all 7 Codes, including the time limits and process for ACMA dealing with complaints unresolved by a broadcaster (CP, pages 4 & 5).

However, the differences in the treatment of privacy in the different Codes appear to be largely a historical accident and most cannot be justified by any practical difference in the operations of the different broadcasters.

ACMA has the power to enforce the provisions of Codes. While they remain so arbitrarily different, neither the employees of broadcasters nor the public can be confident that they know the boundaries of acceptable media behaviour.

7. APF submits that a vital outcome of this review is a commitment to early development and implementation of a single set of common privacy standards or rules for all broadcasters.

We support the need for common Guidelines as guidance:

> "to assist broadcasters to better understand their obligations relating to privacy as set out in the various broadcasting industry codes of practice" (CP, page 1),

but only on a short-term, interim basis.

Limitations of Codes

The use of Codes of Practice or Conduct in regulatory frameworks has been fashionable for a number of years as part of a supposedly 'light touch' approach to regulation. APF submits that the experience of Codes in telecommunications and media environment has been overwhelmingly negative. The complexity, inconsistency, obscurity and very mixed compliance history of Codes, especially in the online domain where they have often failed to keep up with the changing threat environment, has brought them into question as a regulatory model serving the interests of consumers and citizens, as opposed to giving sections of industry an excuse to ignore or sidestep laws protecting people in other circumstances.

We accept that there is some merit in code development processes which allow business sectors, as well as representatives of affected consumers, to participate in the design and content of Codes, provided they do not, as in the past[12], result in 'capture' by the regulated sector. Experience suggests that these processes need to be closely supervised and strict success criteria set, not least in timeliness, to combat delaying tactics by regulated sectors. Most importantly, however, Codes need to be mandatory and binding, with effective enforcement regimes.

We note that the Cyberspace Law and Policy Centre at UNSW is currently reviewing the wide range of Codes of Practice applying to the Internet in Australia, in work supported by auDA, and suggest that ACMA liaises with CLPC[13] about this work to better inform the review of the Privacy Guidelines for Broadcasters.

8. APF submits that key aspects of the Guidelines must be made enforceable. This needs to be achieved through incorporation of the relevant components into a common mandatory Code.

Compliance and enforcement must be through a mixture of education, audit, external systemic enforcement and individual rights to enforce in one's own case, including by easy access to administrative tribunal or court action if unsatisfied with internal and external (EDR) complaint processes.

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[12] ACMA will be well aware of sustained criticism, including from consumer groups, of the Telecommunications Code Development processes and the weaknesses of both ACIF and its successor, the Communications Alliance. See ACCAN's submission to the Reconnecting the Customer review, at http://accan.org.au/index.php?option=com_content&view=article&id=344:reconnecting-the-customer&catid=143:your-rights&Itemid=182

[13] Contact CLPC Executive Director David Vaile d.vaile@unsw.edu.au

Scope of the Guidelines (and Codes)

The Guidelines currently only address two 'types' of invasion of privacy by broadcasters, drawn from the judgments in two court cases:

- disclosing personal information; or
- intruding upon a [person's] seclusion
  (General Principle, CP page 4)

Our 2009 *Privacy and the Media* Policy Statement similarly focuses on collection (seeking) and disclosure (publication) and these are clearly the most immediately obvious areas where media activity can interfere with individuals' privacy.

However, the 'General Principle' is too narrow a definition of invasion of privacy, and as a result the Guidelines focus too narrowly on collection and disclosure.

This is graphically illustrated by ACMA's Case Study 3. ACMA's credibility as a regulator was seriously undermined, because the existing Code fell so seriously short of public expectations.

The Australian Privacy Charter[14] is a benchmark against which the APF assesses all privacy frameworks. The Charter covers information privacy or data protection (the subject of the Privacy Act) but also addresses other dimensions of privacy –physical, territorial and communications – through principles such as 'private space' and 'freedom from surveillance' which are directly relevant to media behavior. We submit that the Charter is a useful reference point for ACMA in reviewing the scope of the Privacy Guidelines for Broadcasters.

The recent Law Reform Commission reports on privacy, which are mentioned in the Consultation Paper, also canvass this wider range of 'harms'. The 2008 ALRC Report *For Your Information*, for instance, commented that the co-regulatory model for the broadcast media (and the self-regulatory model for the print media) may no longer be suitable[15], and concluded its chapter on the journalism exception that while 'it is outside the ALRC's terms of reference to recommend that [its proposed review of the regulation of telecommunications privacy] also should cover the regulation of the broadcast and print media. The ALRC notes however that the Australian Government could consider the appropriateness of such an extension."[16]

The current broadcasting Codes of Practice, and the revised ACMA Guidelines, do address some of these wider issues, but not comprehensively.

Section 123 of the BSA, which requires the development of Codes of Practice by the various categories of commercial and community broadcasters in consultation with ACMA, does not expressly mention privacy as required subject matter (except for subscription broadcasters in relation to the privacy of customers – s123(2)(k)). It is therefore open to ACMA, in considering Codes for registration under

[14] At http://www.privacy.org.au/About/PrivacyCharter.html
[15] Paragraph 42.125
[16] Paragraph 42.129

s123(4), or review under s123A(2), to take as wide or narrow a view of privacy as it sees fit to meet the criterion in those sections of 'appropriate community safeguards'.

The relevant provisions of the ABC and SBS legislation are even less specific as to the content of the Codes that are required to be developed and notified to ACMA.

We therefore submit that it is within ACMA's power to expand the scope of the *Privacy Guidelines for Broadcasters* to cover a much wider range of privacy issues than merely disclosure and seclusion, and that it should do so. We believe that this would have the effect of requiring the separate Codes to be revised to cover the same range of issues. If not, then this should be made an express requirement, if necessary by amendment of the BSA. It makes no sense for the ACMA Guidelines, if they are only advisory, to cover more ground, and be more specific, than the Codes which ACMA can ultimately enforce.

9. APF submits that the Guidelines (and any related Codes) must address the full range of privacy harms identified in the 1994 Australian Privacy Charter.

Convergence, and User generated content

It would appear that the Guidelines, and various broadcaster privacy codes, currently only apply to 'broadcast material'. It is clear that this is no longer a satisfactory scope limitation given the online presence of most broadcasters – delivering not only previously broadcast material but also other related or unrelated material on websites and through social media.

Whilst we understand that there is a separate Convergence Review, and that ACMA cannot be expected to address all of the issues arising in this review of the Privacy Guidelines, we suggest that reference need to be made to convergence and possible ways forward to address inconsistencies or gaps in the regulatory frameworks .

Another important development is the increasing inclusion of listener/viewer comments or blogs into broadcast (and on-line content) material.[17] These comments in 'user generated content' may introduce identifying material, and/or intrude into privacy in other ways. This poses difficulties for broadcasters and other content providers in monitoring and moderating comments, and maintaining editorial standards. The privacy codes, and coverage by ACMA, needs to explicitly address the issue of comments and blogs on media sites potentially bypassing the controls that apply to the broadcaster's (or other content provider's) own staff.

10. APF submits that the Review needs to at least acknowledge the issues arising from convergence, multi-media channels, and user generated content, and ideally offer some interim guidance.

[17] An example is the streaming of Twitter feeds in programmes such as the ABC's Q&A.

The Revised Guidelines

Introduction

This explains the role of the different Codes, and of ACMA, under the BSA. It appears accurate, but see our comments above on the need for the current review to result in much more than mere revision of the Guidelines.

The General Principle

See the discussion above of the scope of the Guidelines (and Codes), and about their status in a wider regulatory context.

11. APF's submits that ACMA should expand the General Principle to cover a wider range of privacy issues.

Investigation steps

The Guidelines (page 4) require two threshold tests to be passed before ACMA will consider that there will be a *potential* breach of Code privacy provisions.

Both are unsatisfactory, for the reasons we explain below:

1. **Was a person identifiable from the broadcast material?**

This is unsatisfactory because no useful guidance is given, either here or later on page 5 or in the Case Studies, as to what is meant by 'identifiable' – an issue which has been well discussed in recent Law Reform Commission reports. Factors that need to be considered include:

- identifiable to whom – e.g. To the individual themself? To someone who might know the individual concerned? Or to an unconnected member of the public?, and
- identifiable with or without other relevant information e.g. could someone without too much trouble obtain other information that would allow them to identify an individual concerned who would otherwise not be identifiable? This would include situations where a privacy harm could occur even if no third party actually chose to identify an individual e.g. a broadcast of an alleged offender outside an identifiable address which could lead to 'vigilante' action.

Without consideration of these and other factors, the test is too simplistic, and even misleading.

It also fails to address the situation where a privacy harm might occur without an individual being actually identifiable to any third party from the broadcast material, or even from the broadcast and other information. Surely an individual should have a right to protection against broadcast material that intrudes on their privacy in a way that for instance humiliates or ridicules them, even if they are the only person to know that the material is about them?

12. APF submits that the test must be whether the person is identifiable by any means, not whether the person is identifiable from the broadcast material alone.

2. **Did the broadcast material disclose personal information or intrude upon the person's seclusion in more than a fleeting way?**

This is unsatisfactory because whether the disclosure or intrusion was 'fleeting' should be irrelevant – the question should be whether it lasted long enough for (a) identification of an individual and (b) for one of a range of privacy 'harms' to occur?

It is any case incongruous to retain such a time-based criterion in an era when the capture, storage and re-publication of broadcast material (however fleeting its initial publication) has become simple, inexpensive and automated.

13. APF submits that the test must be whether the broadcast material breaches the person's reasonable expectation of privacy, and should contain no threshold test of how long it lasts.

The Guidelines then set up a further three tests which must be passed for there to be an actual breach – these are in effect exceptions. Again, they are all unsatisfactory, for the reasons explained below:

Was the person's consent obtained—or that of a parent or guardian?

See the discussion below under '*Consent*'

Was the broadcast material readily available from the public domain?

See the discussion below under '*Material in the public domain*'

Was the invasion of privacy in the public interest?

See the discussion below under '*Public Interest*'

Guidance on terms and concepts

Identifiable

As noted above, this guidance does not address the main issues surrounding identification. Instead, it deals with a separate issue of when public figures might expect less privacy.

14. APF submits that public figure expectations of privacy should be addressed elsewhere – probably under 'public interest'.

The guidance under the 'identifiable' heading should address the factors already discussed above.

Personal Information

This guidance gives examples but is not exhaustive. At a minimum, it needs to include the definition of personal information from the Privacy Act, which includes a sub-set of specified sensitive information The Guidelines attempt to paraphrase the Privacy Act definition but it is unhelpful to have different formulations of the same term.

The reminder that information need not be secret or confidential in order to be private is useful except that the concept of 'private' is not used in the Privacy Act and can lead to confusion

15. APF submits that the document should say that "information need not be secret or confidential in order to be subject to these Guidelines".

Seclusion

This guidance is useful, but does not go far enough. The criterion of "a reasonable expectation that his or her activities would not be observed or overheard by others" risks negating a privacy claim if the person involved is 'consensually' with one or more third parties.

16. APF submits that the seclusion criterion needs to be re-worded to enable an individual to be able to enjoy seclusion in company.

The second criterion test that "a person of ordinary sensibilities would consider the broadcast of these activities to be inappropriate or offensive" is appropriate. We note that it is different from the test proposed by the Law Reform Commissions for a privacy right of action that the intrusion be 'highly offensive to a reasonable person of ordinary sensibilities'. Without prejudice to our position on the criterion for a private right of action, we submit that the lesser standard is appropriate for the Guidelines and Codes for broadcasts.

The additional guidance that intrusion may be into "everyday activities and it will usually include sexual activities" is appropriate and welcome, as is the guidance that 'It is possible for this to occur in a public space' but we disagree with the qualification that 'the invasion must be more than fleeting' – for the reasons already explained above.

Consent

This guidance does not do justice to a complex issue addressed in detail in Law Reform Commission Reports. While it is appropriate to explain that consent may be either express or implied, there are many other factors that need to be considered before reaching a view that consent is genuinely free and informed. Assessment of the quality of consent includes issues such as voluntary/coerced, before or after the fact, explicit or implicit, revocable or permanent, properly informed or not, bundled or separate, and other contextual issues.

The other guidance concerning deception, surreptitious collection and absence of objection is appropriate.

APF's 2009 Policy Statement included the following on consent:

> "The consent of the individual concerned is sufficient justification for personal data to be collected and published. Particularly for sensitive personal data, express consent is needed. For less sensitive data, implied consent may be sufficient. Where multiple individuals are directly identified (rather than merely indirectly implicated), the consent of each is needed."

17. APF submits that the consent discussion and guidance need to be expanded to reflect a deeper understanding of the nature of free and informed consent.

Children and vulnerable people

This guidance is useful, but no definition of 'vulnerable person' is given, and the choice of age 16 for the definition of a child appears arbitrary. While the definition of child varies considerably in different laws and contexts, we accept that some practical guidance for broadcasters is desirable, but the choice of 16 needs to be debated and justified.

APF's 2009 Policy Statement noted:

> "Special care is needed in relation to categories of people who are reasonably regarded as being vulnerable, especially children and the mentally disabled, but depending on the circumstances, other groups such as homeless people and the recently bereaved."

18. APF submits that the 'vulnerable people' discussion and guidance need to be expanded.

Once the definitions, and examples, are agreed, the rest of the guidance in this section is appropriate.

Material in the public domain

This guidance is unsatisfactory because context is all important – the mere fact that an individual's address, for instance, may be publicly available in a variety of places, should not necessarily make a broadcast that identifies an individual outside their house immune from being a privacy breach (see the example given above under the 'identifiable' test).

Furthermore, the fact that one media outlet has opted to place certain personal information in the public domain should not work as an excuse for other media outlets publishing that personal information if it would otherwise be protected under the Guidelines.

19. APF submits that the 'material in the public domain' discussion and guidance need to be expanded.

Public Interest

This guidance is unsatisfactory in that it does not reflect the full debate that has already taken place in recent years, in the context of the various Law Reform Commission inquiries into privacy and in other contexts.

The Guidelines are contradictory in first stating that: 'The use of material in a broadcast will not be an invasion of privacy if there is a clear and identifiable link between it and the public interest…' and then later stating: 'Any material that invades a person's privacy in the public interest must directly or indirectly contribute …' We favour the latter view - whether an invasion of privacy has occurred should be a separate question involving the criteria set out earlier in the Guidelines and already discussed. Whether that invasion is justified in the public interest should be a defence, not a denial of the invasion.

The examples given of public interests is useful but it should be made clearer that the list is not exhaustive.

We welcome, and strongly support, the statement that: 'Not all matters that interest the public are in the public interest'. The contrary view, often expressed by media organizations, would amount to an open licence for invasions of privacy.

The guidance drawn from three footnoted court judgments (footnotes 10 & 11 on CP page 7) is useful but only covers some of the relevant factors.

The guidance about public figures is unsatisfactory and requires deeper consideration. The sentence 'However, it is unlikely to be in the public interest if it is merely distasteful, socially damaging or

embarrassing' needs rewording to make it clear what the 'it' refers to – the program material or the behavior of the public figure?

ACMA's decision in Case Study 7 earned justified criticism from many different segments of society – including from within the print media. Part of the problem was that ACMA appeared to deny privacy rights to the Minister on the grounds that "those holding public office will be open to greater and more frequent scrutiny". This is a seriously inadequate criterion. It is essential that publishers be able to justify why each specific item of personal data that they disclose is relevant to the public interest.

In our 2009 policy statement we have suggested the following guidance on relevance factors in assessing 'the public interest':

> **"Relevance to the Performance of a Public Office**. This encompasses all arms of government, i.e. the parliament, the executive and public service, and the judiciary. The test of relevance is mediated by the significance of the role the person plays. Publication of the fact that a Minister's private life has been de-stabilised (e.g. by the death of a family member, marriage break-up, or a child with drug problems) is more likely to be justifiable than the same fact about a junior public servant. Publication of the identities and details of other individuals involved (e.g. the person who died, or the child with drug problems) is also subject to the relevance test, and is far less likely to be justifiable.
>
> **Relevance to the Performance of a Corporate or Civil Society Function of Significance**. The relevance test needs to reflect the size and impact of the organisation and its actions, the person's role and significance, and the scope of publication.
>
> **Relevance to the Credibility of Public Statements**. Collection and disclosure of personal data may be justified where it demonstrates inconsistency between a person's public statements and their personal behaviour, or demonstrates an undisclosed conflict of interest.
>
> **Relevance to Arguably Illegal, Immoral or Anti-Social Behaviour**. This applies to private individuals as well as people performing functions in organisations. For example, in the case of a small business that fails to provide promised after-sales service, or a neighbour who persistently makes noise late at night, some personal data is likely to be relevant to the story, but collection and disclosure of other personal data will be very difficult to justify.
>
> **Relevance to Public Health and Safety**. For example, disclosure of a person's identity may be justified if they are a traveller who recently entered Australia and they are reasonably believed to have been exposed to a serious contagious disease.
>
> **Relevance to an Event of Significance**. For example, a 'human interest' story such as a report on bush fire-fighter heroics, may justify the publication of some level of personal data in order to convey the full picture. Generally, consent is necessary; but where this is impractical and the story warrants publication, the varying sensitivities of individuals must be given sufficient consideration. This is especially important in the case of people caught up in an emergency or tragedy, who are likely to be particularly vulnerable.
>
> **Any Other Justification**. A justification can be based on further factors. However, in the handling of a complaint, any such justification must be argued, and the onus lies on the publisher to demonstrate that the benefits of collection or publication outweigh the privacy interest.
>
> **Mitigating Factors**. The outcome of the above relevance tests may be affected by the following factors:
>
> **Self-Published Information**. Where an individual has published personal data about themselves, that person's claim to privacy is significantly reduced. However it is not extinguished. In particular, justification becomes more difficult the longer the elapsed time since the self-publication took

place, and the less widely the individual reasonably believed the information to have been made available. Further, only information published by the individual themselves affects the relevance test, not publication by another individual, even a relative or close friend or associate.

[We would update this element to include a note that, for example, self-publication to a small circle of friends e.g. via social-media like Facebook, should not be taken as a *carte blanche* for more widespread publication.]

Public Behaviour. Where data about an individual arises from public behaviour by that individual, the person's claim to privacy is reduced. However, public behaviour does not arise merely because the individual is 'in a public place'. For example, 'public behaviour' does not include a quiet aside to a companion in a public place."

Attention-Seekers. In the case of people who are willingly in the public eye (e.g. celebrities and notorieties), consent to collect and publish some kinds of personal data may be reasonably inferred. But this does not constitute 'open slather', and active denial of consent must be respected. This mitigating factor is not applicable to the attention-seeker's family and companions.

20. APF submits that the 'public interest' and 'public figure' discussion and guidance in the Guidelines need to be greatly expanded, and should reflect all aspects of the APF's 2009 Policy Statement, reproduced above.

For further information please contact:

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Please note that APF's preferred mode of communication is by email, which should be answered without undue delay. APF does not have an organisational postal address. If postal communication is necessary, please contact the person named above to arrange for a postal address.

A list of the specific numbered submission points follows in the Appendix.

Appendix 1 - List of Main Submission Points

1. On the assumption that the Codes are a basis for the journalism exemption from the provisions of the Privacy Act, APF submits that it is essential that the Codes are comprehensive, appropriately protective of all aspects of privacy, enforceable, and enforced.

2. The Consultation Paper does not adequately reflect the relevant findings of the ALRC (and those of the State Law Reform Commissions that have also recently reported on privacy). APF submits that it is essential that ACMA consider them, address them, and reflect them in the Guidelines, and require them to be reflected in all relevant Codes.

3. APF cautions against any conclusion that the small number of privacy complaints to ACMA about broadcasters means there is little public concern.

4. APF submits that ACMA should collate statistics for the broadcasting industry as a whole, in a manner that encompasses all privacy-related complaints, and aids comparisons.

5. APF submits that ACMA should review the survey research previously conducted by the Privacy Commissioner, place it in the context of ACMA's own research published in August 2011, and publish the results as further input to the review.

6. APF submits that the Consultation Paper places too much reliance on court judgments of limited relevance, and places too little weight on the more considered views of Law Reform Commissions which have approached the subject of privacy in more comprehensive inquiries.

7. APF submits that a vital outcome of this review is a commitment to early development and implementation of a single set of common privacy standards or rules for all broadcasters.

8. APF submits that key aspects of the Guidelines must be made enforceable. This needs to be achieved through incorporation of the relevant components into a common mandatory Code.

9. APF submits that the Guidelines (and any related Codes) must address the full range of privacy harms identified in the 1994 Australian Privacy Charter.

10. APF submits that the Review needs to at least acknowledge the issues arising from convergence, multi-media channels, and user generated content, and ideally offer some interim guidance.

11. APF's submits that ACMA should expand the General Principle to cover a wider range of privacy issues.

12. APF submits that the test must be whether the person is identifiable by any means, not whether the person is identifiable from the broadcast material alone.

13. APF submits that the test must be whether the broadcast material breaches the person's reasonable expectation of privacy, and should contain no threshold test of how long it lasts.

14. APF submits that public figure expectations of privacy should be addressed elsewhere – probably under 'public interest'.

15. APF submits that the document should say that "information need not be secret or confidential in order to be subject to these Guidelines".

16. APF submits that the seclusion criterion needs to be re-worded to enable an individual to be able to enjoy seclusion in company.

17. APF submits that the consent discussion and guidance need to be expanded to reflect a deeper understanding of the nature of free and informed consent.

18. APF submits that the 'vulnerable people' discussion and guidance need to be expanded.

19. APF submits that the 'material in the public domain' discussion and guidance need to be expanded.

20. APF submits that the 'public interest' and 'public figure' discussion and guidance in the Guidelines need to be greatly expanded, and should reflect all aspects of the APF's 2009 Policy Statement, reproduced above.